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In the
Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, LINDA CHAVEZ, AND RICHARD CLAYTON TROTTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Twice in the past three years this Court has recognized that agency-shop provisions—which compel public employees to financially subsidize public sector unions' efforts to extract union-preferred policies from local officials—impose a "significant impingement" on employees' First Amendment rights. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012); *see also Harris v. Quinn*, 134 S. Ct. 2618 (2014). California law requires every teacher working in most of its public schools to financially contribute to the local teachers' union and that union's state and national affiliates in order to subsidize expenses the union claims are germane to collective bargaining. California law also requires public school teachers to subsidize expenditures unrelated to collective bargaining unless a teacher affirmatively objects and then renews his or her opposition in writing every year. The questions presented are therefore:

1. Whether *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF has repeatedly litigated in defense of the right of workers not to be compelled to make involuntary payments to support political or expressive purposes with which they disagree. To that end, PLF attorneys were counsel of record in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Brosterhous v. State Bar of Cal.*, 12 Cal. 4th 315 (1995); and *Cumero v. Pub. Emp't Relations Bd.*, 49 Cal. 3d 575 (1989), and PLF has participated as amicus curiae in all of the most important cases involving labor unions compelling workers to support political speech, from *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), to *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

Linda Chavez has written extensively on labor union issues. She co-authored *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* (2004), which argues that unions have abandoned their traditional role of organizing workers and representing their interests through

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

collective bargaining, and have become a de facto arm of the Democratic Party, using union dues to provide staff, election materials and other in-kind contributions to candidates at the local, state, and federal levels. In 2001, President Bush nominated Chavez to be Secretary of Labor, but she subsequently withdrew her name from consideration. She was formerly the Assistant to the President of the American Federation of Teachers (AFT) and editor of the union's newspaper, *American Teacher*, and assistant director of legislation at the AFT, where she worked from 1974-1983.

Richard Clayton Trotter is a tenured Associate Professor at the University of Alaska, Anchorage, College of Business and Public Policy. He previously served for 17 years as an Associate Professor of Business Administration at Trinity University and has taught at Texas Tech University. Also an attorney licensed in Texas, Florida, and multiple federal courts, including this Court, Professor Trotter was one of the founding professors at Regent University School of Law. He is required as a condition of his current employment to pay agency shop fees to United Academics, the public employee union that represents university faculty. Professor Trotter has not joined the union because he disagrees with certain positions taken by the union and does not believe he has received any benefit from the agency shop fees he is required to remit. If Professor Trotter fails to pay the fees, however, the University can terminate his employment, notwithstanding his tenure.

INTRODUCTION AND SUMMARY OF ARGUMENT

California law forces all public school teachers to pay chargeable dues to the labor union that represents them, regardless of whether they are union members. Cal. Gov't Code § 3546(a). California law also forces all public school teachers to pay nonchargeable union dues unless they expressly opt-out of those payments. *Cumero*, 49 Cal. 3d at 589-90 (nonchargeable expenditures "may also be financed out of service fees paid by nonmembers who are sufficiently informed of the proposed expenditure and are given an opportunity to object, yet fail to do so."). The teacher-plaintiffs in this case challenged both of these laws as unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution. Their claims currently are foreclosed by *Abood v. Detroit Bd. of Educ.*, which gave public employee unions authority to garnish the wages of non-union workers for all "collective bargaining purposes" and for all additional lobbying unless the worker jumps through onerous procedural hoops to "opt out."

As this Court acknowledged in *Knox*, 132 S. Ct. at 2289-90, and *Harris*, 134 S. Ct. at 2632-34, the decision in *Abood* was based on faulty premises and an unrealistic view of public-employee unionism, with the resulting infringement on individual rights. Beyond the obviously political expenditures that the unions admit are nonchargeable, "chargeable" collective bargaining expenses are also political in nature, if for no other reason than that collective bargaining in the public sector depends on lobbying and affects allocation of public resources (e.g., tax dollars). The distinction between chargeable and nonchargeable dues is

untenable and highlights the basic problem with *Abood*: it allows the state to force people to pay for political causes with which they disagree. *Abood* has permitted infringement of dissenting workers' First Amendment rights for too long. It should be overruled.

ARGUMENT

I

PUBLIC SECTOR COLLECTIVE BARGAINING IS INHERENTLY POLITICAL

A. *Abood* Identified, Then Improperly Discounted, the Political Component of Public Sector Union Collective Bargaining

In *Harris v. Quinn*, this Court criticized *Abood* for failing to distinguish between the unionization of public-sector and private-sector workers, noting that "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." 134 S. Ct. at 2632. *Abood* also failed to acknowledge the difficulty of separating "chargeable" from "nonchargeable" union expenditures, a "substantial judgment call" the Court has been forced to make in a number of cases since *Abood*. *Id.* at 2633 (citing *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507 (1991); *Locke v. Karass*, 555 U.S. 207 (2009)).

These criticisms of *Abood* are well taken because all public employee negotiations are inherently

political, whether they go to collective bargaining or to other, concededly nonchargeable, activities.

The *Abood* Court did, in fact, acknowledge this reality, although it discounted its legal import. The majority decision briefly identified several differences between private and public sector unions, finally noting, "There can be no quarrel with the truism that because public employee unions attempt to influence governmental policymaking, their activities and the views of members who disagree with them may be properly termed political." 431 U.S. at 231. Chief Justice Rehnquist's concurring opinion further explained that

> the positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word "political" be taken in its normal meaning. Success in pursuit of a particular collective-bargaining goal will cause a public program or a public agency to be administered in one way; failure will result in its being administered in another way.

Id. at 243 (Rehnquist, C.J., concurring). Justice Powell, concurring in the judgment, explicitly equated the goals and methods of public sectors unions with political parties and opined,

> Collective bargaining in the public sector is "political" in any meaningful sense of the word. This is most obvious when public-sector bargaining extends . . to such matters of public policy as the educational philosophy that will inform the high school

> curriculum. But it is also true when public-sector bargaining focuses on such "bread and butter" issues as wages, hours, vacations, and pensions. Decisions on such issues will have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates.

Id. at 257-58 (Powell, J., concurring in the judgment). The *Abood* opinions only scratched the surface of the political nature of collective bargaining with public employee unions, and failed to fully appreciate the depth and breadth of the alliance between public sector unions and their collective bargaining "adversaries."

B. Statutes Govern Many Aspects of Public Employment

The terms and conditions of public employment are governed, at least in broad strokes, by statutes. A statute that sets terms of public employment shares with all other statutes the elevated position of codified public policy for the local or state government that enacts it. *See Bob Jones Univ. v. U.S.*, 461 U.S. 574, 612 (1983) (Powell, J., concurring) ("The contours of public policy should be determined by Congress, not by judges or [a federal agency]"); *Building Serv. Emps. Int'l Union Local 262 v. Gazzam*, 339 U.S. 532, 536 (1950) ("The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the lawmakers to determine the public policy of the state.' ") (citation omitted); *Muschany v. U.S.*, 324 U.S. 49, 68 (1945) ("[I]t is Congressional enactments which determine public policy"); *In re Marriage of Davis*, 61 Cal. 4th 846, 352 P.3d 401, 414 (2015) (state legislature bears

responsibility for weighing policy concerns and adopting or modifying statutes that reflect those concerns).

California statutes are replete with terms and conditions of public employment, as well as other job-related matters. *See, e.g.*, Cal. Educ. Code § 47605 (conversion of a traditional public school to a charter school cannot be controlled by a collective bargaining agreement); Cal. Educ. Code § 51223 (establishing minimum amount of time for physical education); Cal. Labor Code § 220.2 (public employee contributions to vacation allowances, pension or retirement funds, sick leave, and health and welfare benefits); Cal. Labor Code § 224 (public and private employers may withhold wages when authorized by state or federal law, a collective bargaining agreement, or wage agreement); Cal. Labor Code § 2928 (limiting deduction of wages for tardiness); Cal. Gov't. Code § 3300 *et seq.* (Public Safety Officers Procedural Bill of Rights Act, applicable to all public safety officers in California, regardless of their employer). *Cf.* Cal. Gov't Code § 3500 *et seq.* (Meyers-Milias-Brown Act governs collective bargaining and employment relations for most California local public entities, including cities, counties, and special districts). *See also Coachella Valley Mosquito & Vector Control Dist. v. Cal. Public Emp't Relations Bd.*, 35 Cal. 4th 1072, 1084-86 (2005) (detailing multiple statutes governing public employment).

The state's courts construe union contracts in light of the policies in these statutes. While many details of public employment are left to negotiation, no aspect of a collective bargaining agreement can counter the public policies established by statute. Thus, the

California Supreme Court held that provisions of a collective bargaining agreement between public school teachers and a school district are invalid to the extent they directly conflict with provisions of the California Education Code. *United Teachers of Los Angeles v. Los Angeles Unified Sch. Dist.*, 54 Cal. 4th 504, 509 (2012). *See also Grier v. Alameda-Contra Costa Transit Dist.*, 55 Cal. App. 3d 325, 335 (1976) (statute establishing the amount of wages that may be withheld from tardy public employees trumps collective bargaining agreement that established a different amount).

In *Bd. of Education v. Round Valley Teachers Ass'n*, 13 Cal. 4th 269, 287 (1996), that court held that statutory procedures for notifying a probationary employee that she will not be retained preempt a collective bargaining agreement containing a different notice procedure. Similarly, the state courts forbid arbitrators from interpreting a memorandum of understanding between a public employee union and the state to require salary or benefit increases beyond those approved by the state Legislature. *Cal. Dep't of Human Res. v. Serv. Emps. Int'l Union, Local 1000*, 209 Cal. App. 4th 1420, 1434 (2012); *Cal. Statewide Law Enforcement Ass'n v. Cal. Dep't of Pers. Admin.*, 192 Cal. App. 4th 1, 16 (2011).

Where state statutes directly govern the terms and conditions of public employment, overriding negotiated agreements to the contrary, public employee unions devote time and energy to determining the content of those statutes—lobbying for passage and modification as they will.

C. The Terms and Conditions of Public Employment Necessarily Involve Public Policy—That Is, *Political*—Considerations

Most fundamentally, unions exist to promote the economic interests of their members, starting with negotiation of wages and benefits and extending to a wide variety of government policies that affect, even tangentially, the unionized workforce.[2] They are private interest groups, like any other. But *unlike* their private-sector counterparts, the wages, benefits, working conditions, and opportunities for which public-sector unions negotiate are provided exclusively by the government, and paid for exclusively through tax dollars.

"Since the wages of public employees bear directly on the overtly political issue of state budgets, including the appropriate levels of public expenditure and taxation, the 'economic' advocacy of public employee unions touches directly on matters of political concern." *State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 134 n.7 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1002 (2014). *See also Murray v. Town of Stratford*, 996 F. Supp. 2d 90, 116 n.33 (D. Conn. 2014) (union's successful advocacy for including overtime pay in

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[2] For example, the California Teachers Association defines its mission as: "to protect and promote the well-being of its members, to improve the conditions of teaching and learning, to advance the cause of free, universal, and quality public education, to ensure that the human dignity and civil rights of all children and youth are protected, and to secure a more just, equitable, and democratic society." Dep't of the Treasury, Internal Revenue Service, Form 990 (California Teachers Association), http://www.guidestar.org/FinDocuments/2013/940/362/2013-940362310-0a7b7b1f-9O.pdf.

pension benefit calculations increased the town's financial liability to retiring firefighters); *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.*, 46 Cal. 4th 822, 836 (2009) (public employee unions "have an important political dimension, given that they are governed by and negotiate with government entities.").

Thus in the negotiations between government and public employee unions, monopoly sits on one side of the table, and monopsony sits on the other. The taxpayer has no seat.

Rowland, *Stratford*, and other recent holdings are based on the works of Harry Wellington and Ralph Winter, Jr., and Clyde Summers, who were among the first to explore the implications of then-newly established public employee unions. *See generally* Harry H. Wellington & Ralph K. Winter, Jr., *The Unions and the Cities* (1971); Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale. L. J. 1156, 1164 (1974). Wellington and Winter explained that "[c]ollective bargaining by public employees and the political process cannot be separated. The costs of such bargaining, therefore, cannot be fully measured without taking into account the impact on the allocation of political power in the typical municipality." *Unions and the Cities*, *supra*, at 29.

Summers identified three specific political implications of public employee union bargaining:

First, because the union enjoys exclusive representation of all employees in the bargaining unit, any "[d]issonance or indifference in the employee group is submerged, giving the employees' voice increased

clarity and force." *Political Perspective, supra*, 83 Yale L. J. at 1164.

Second, unlike typical citizens who present their concerns to government officials on a sporadic basis and with no guarantee of a firm commitment from the officials, unions are entitled to demand good-faith bargaining from the officials, on a long-term consistent basis, until they receive a firm commitment, or one side declares an impasse (which leads to further mandated procedures). *Id.*

Third, the union enjoys "a closed two-sided process within what is otherwise an open multi-sided process. Other groups interested in the size or allocation of the budget are not present during negotiations and often are not even aware of the proposals being discussed." *Id.* These other groups—including, of course, taxpayers—have no formal opportunity to present their concerns or generate their own political pressure. *Id.*[3]

Theoretically, the government officials could represent those other interests, but as a practical matter, that representation is minimal or nonexistent. As an example, consider *DiQuisto v. County of Santa Clara*, 181 Cal. App. 4th 236, 242 (2010). That

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[3] Unions fully understand the advantages they enjoy with behind-closed-doors negotiations. When a handful of local California governments enacted ordinances to increase transparency by making offers and counter-offers available on a website for public review and comment prior to finalization, the unions retaliated by sponsoring state legislation that would burden these jurisdictions—and only these jurisdictions—with onerous and expensive auditing and reporting requirements. Dan Walters, *Union bills proliferate in Capitol*, Sacramento Bee (July 20, 2015), http://www.sacbee.com/news/politics-government/dan-walters/article27961960.html.

litigation arose out of political jockeying regarding local initiatives relating to arbitration of labor disputes. The Registered Nurses Professional Association, the California Correctional Peace Officers Association, and the Government Attorneys' Association (all public sector unions), sponsored a local ballot initiative, Measure C, to amend the county charter to mandate binding arbitration as the means of resolving labor disputes with the County. The County opposed the measure and placed two counter-measures on the ballot. Meanwhile, the unions and the County were negotiating a collective bargaining agreement, during which negotiations the County urged the unions to withdraw their support for the initiative. *Id.* at 242-44. The negotiations and politicking were inextricably intertwined.

For all these reasons, many courts have acknowledged the inherent political tension created by public employee collective bargaining. *See, e.g.*, *Montgomery Cnty. Educ. Ass'n v. Bd. of Educ. of Montgomery Cnty.*, 534 A.2d 980, 987 (Md. 1987) ("Public school employees are but one of many groups in the community attempting to shape educational policy by exerting influence on local boards." Because the unions can force boards "to submit matters of educational policy to an arbitrator, the employees can distort the democratic process by increasing their influence at the expense of these other groups."); *Commonwealth v. Cnty. Bd. of Arlington Cnty.*, 232 S.E.2d 30, 39 (Va. 1977) (agreements between county boards and the unions "seriously restricted the rights of individual employees to be heard" and "granted to labor unions a substantial voice in the boards' ultimate right of decision in important matters affecting both the public employer-employee relationship and the

public duties imposed by law upon the boards."). *See also* R. Theodore Clark, Jr., *Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. Cin. L. Rev. 680, 681 (1975) (the combination of public employee union collective bargaining and the unions' active participation "in the election of the officials with whom they negotiate at the bargaining table gives public sector unions a disproportionate amount of power" that "distort[s] the political process.").

The dissenting voices of union members who do not support the views of the union leadership, the non-union members forced to pay agency shop fees, and taxpaying members of the public are effectively silenced by public employee union collective bargaining. Yet the taxpayers, in particular, have an economic interest in the result of the bargaining as much as the parties at the table, because they are both "the source of funds for the public employer and the recipient of the public services negotiated." Leo Troy, *Are Municipal Collective Bargaining and Municipal Governance Compatible?*, 5 U. Pa. J. Lab. & Emp. L. 453, 454 (2003). They are the source of the funds, yet the taxpayers have little means to track expenditures, as their taxes are collected generally, not itemized for public schools, utilities, law enforcement, and so on. Only when government agrees to a union deal that so dramatically affects the public resources that it generates press reports does the public begin to get an inkling of what their tax dollars are expected to support. *See, e.g.*, Michael Powell, *Public Workers Face Outrage as Budget Crises Grow*, New York Times (Jan. 1, 2011) ("In California, pension costs now crowd out spending for parks, public schools and state universities; in Illinois, spiraling pension costs

threaten the state with insolvency. And taxpayer resentment simmers.").[4]

An agreement to increase wages, for example, may well result in a decrease in public services as operations are reduced to boost salaries and benefits. Negotiated holidays force city services to cease for the day, just as negotiated "in-service" days for teachers close schools, leaving working parents on the hook for child care, or requiring them to use a vacation day of their own. And in recent years, the cumulative effect of generous public employee pensions has made headlines. California's Little Hoover Commission, a bipartisan state oversight agency, estimated in 2011 that the state's ten largest public pension plans (encompassing 90% of all public employees) have unfunded liabilities of $240 billion. Little Hoover Comm'n, *Public Pensions for Retirement Security* 3 (2011).[5] Under such a burden, large California cities are forced to devote one-third of their entire operating budgets to pension payments. *Id.* at 21. The consequences for the general public—both as taxpayers, and as consumers of government services—are obvious. *See Cal. Statewide Law Enforcement Ass'n v. Cal. Dep't of Pers. Admin.*, 192 Cal. App. 4th 1, 4 (2011) (public employee union collective bargaining "agreements, which have been under the public's radar in the past, are now coming to light due to the massive budget deficit the State is facing.").

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[4] http://www.nytimes.com/2011/01/02/business/02showdown.html?_r=0.

[5] http://www.lhc.ca.gov/studies/204/Report204.pdf.

The bottom line is that "the collective agreement is not an economic decision but a political decision; it shapes policy choices which rightfully belong to the voters to be made through the political processes. Collective bargaining in the public sector is properly and inevitably political; to try to make it otherwise denies democratic principles." Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. Tol. L. Rev. 265, 266 (1987).

II

CALIFORNIA'S PUBLIC SECTOR UNIONS EXERT TREMENDOUS POLITICAL POWER ACROSS A WIDE RANGE OF PUBLIC ISSUES

A. The California Teachers Association Leads California Public Sector Unions in Pursuing Political Goals Through Collective Bargaining and Other Political Processes

Collective bargaining negotiations are only one avenue for unions to pursue their goals. The negotiations, far from occurring in a vacuum, are intimately tied to the close relationship that unions develop with the elected officials ostensibly on the other side of the table. Rutgers University economics professor Leo Troy spells out four main ways that unions apply political pressure to achieve their goals: (1) cash; (2) free labor time; (3) information; and (4) benefits derived from the unions' structure. Troy, *Municipal Collective Bargaining*, 5 U. Pa. J. Lab. & Emp. L. at 454-55. California public sector unions

have mastered all four, making them political power-brokers in every aspect of their endeavors.

1. **Cash**

It is no easy matter to track public employee union spending. Most of the statewide unions, including the California Teachers Association, collect revenue from members through their local affiliates, which retain most of the money for local collective bargaining and political expenditures. There are over 1,300 California Teachers Association local affiliates, 20 public sector Service Employees International Union local affiliates, 42 Association of Federal, State, and Municipal Employees local affiliates, 45 American Federation of Teachers local affiliates, several hundred California State Employees Association local affiliates (representing classified public school employees), and hundreds of California Professional Firefighters local affiliates. Many of these unions band together, forming federations, such as the California State Employees Association and the Peace Officers Research Association of California, that also collect revenue from members through local affiliates.

In sum, over 6,000 local government union organizations exist in California, each of them an independent financial entity. Ed Ring, California Policy Center, *Understanding the Financial Disclosure Requirements of Public Sector Unions* (June 21, 2012).[6]

The state does not require comprehensive financial reporting of these affiliates along with their statewide counterparts, and the unions have no reason to voluntarily provide a transparent accounting. Even

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[6] http://californiapolicycenter.org/understanding-the-financial-disclosure-requirements-of-public-sector-unions/.

with these challenges, researchers have demonstrated that teacher unions are among the top donors to national, state, and local political campaigns. Terry M. Moe, *Special Interest: Teachers Unions and America's Public Schools* 290-94 (Brookings Inst. 2011). They are most effective in influencing policymaking at the local level. Clark, *supra*, 44 U. Cin. L. Rev. at 684 ("[a] highly organized public employee union [has] a totally disproportionate impact on low turnout elections—typically municipal and school board elections."). In one study of local school board elections, incumbents who did not have a union endorsement lost more often than not, but incumbents with union support won 92 percent of their races. Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 Or. L. Rev. 673, 702-3 (2013) (citation omitted).

The California Fair Political Practices Commission, a state agency, issued a report in 2010 entitled *Big Money Talks: California's Billion Dollar Club* (Mar. 2010),[7] that detailed the spending of the top 15 special interest groups in the state. It reviewed all campaign and lobbying reports from January 1, 2000 to December 1, 2009. *Id.* at 8. Topping the list at the "vortex of political power," *id.* at 4, was the California Teachers Association. *Id.* at 11. The second largest spender is also a consortium of public sector unions, the California State Council of Service Employees. *Id.* at 13.

a. Candidates

Public sector unions support elected officials for a simple reason: by making them "dependent on union

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[7] http://www.fppc.ca.gov/reports/Report38104.pdf.

money and manpower to ensure their reelection, the unions end[] up controlling the very people with whom they negotiate[] for higher wages or better benefits." Linda Chavez & Daniel Gray, *Betrayal: How Union Bosses Shake Down Their Members and Corrupt American Politics* 105 (2004).

A California Fair Political Practices Commission report shows that the California Teachers Association's donations to the California Democratic Party were the largest donations to a political party made by any of the 15 large donors examined in the report. *Big Money Talks, supra*, at 12. But the California State Council of Service Employees holds the number one ranking for candidate support or opposition, spending $18,786,136 directly and another $2,535,000 via contribution to Opportunity PAC, which made independent expenditures on behalf of favored candidates. The Service Employees unions did not sit out the initiative battles; they spent an impressive additional $25,000,000 to defeat paycheck protection, to lower the vote requirement for approval of the state budget, and to increase health care coverage requirements for employers. *Id.* at 13-14. Like the California Teachers Association, the Service Employees unions favor Democrats almost exclusively despite the fact that many workers are themselves conservative. *See* Center for Responsive Politics, *OpenSecrets.org*, Service Employees International Union.[8]

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[8] http://www.opensecrets.org/orgs/summary.php?id=D000000077&cycle=2014.

b. Issues

The Fair Political Practices Commission report notes that the California Teachers Association's biggest single expenditure in the 2000s was $26,366,491 to defeat a school choice initiative, Proposition 38. *Big Money Talks*, *supra*, at 11. And the union spent more than $50,000,000 to defeat three statewide initiatives in 2005: It spent $8,224,449 to defeat Proposition 74, which would have required teachers to work five years instead of two to acquire tenure; $12,102,416 to defeat Proposition 75, a paycheck protection act; and $13,681,685 to defeat Proposition 76, relating to minimum school funding requirements. *Id.* at 12. The teachers' union further contributed more than $20,000,000 to the Alliance for a Better California, a group similarly dedicated to defeating the initiatives. *Id.* *See also* Joetta L. Sack, *Calif. Teachers Rally Against Ballot Measures*, Education Week (Oct. 25, 2005)[9] ("The CTA, an affiliate of the National Education Association, will spend about $50 million, *to be raised through increased dues*, to stave off the three proposals backed by the governor and other conservatives.") (emphasis added).

This money comes from the paychecks of government employees, who are paid from taxpayer money—and it is used to subsidize efforts to expand union power and increase government spending: an endless cycle of government funding demands for its own growth, all at the expense of citizens and dissenting workers who are forced to contribute to the enterprise.

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[9] http://www.edweek.org/ew/articles/2005/10/26/09cta.h25.html.

2. Free Labor Time

Public sector unions offer free manpower to candidates and campaigns in two ways. First, they often negotiate "release time" whereby the taxpayers pay salaries for public employees to work, not for the public, but for the union itself—and this work frequently includes lobbying and other means of influencing public policy. *See Cheatham v. DiCiccio*, __ P.3d __, 2015 WL 4747275, *6-8 (Ariz. Ct. App. Aug. 11, 2015) (city's collective bargaining agreement paying $1.7 million to the Phoenix Law Enforcement Association for "release time" held an invalid gift of public funds under the state constitution because the union received a "grossly disproportionate" benefit; release time employees worked solely for the benefit of the union and owed no duties to the city whatsoever); *Santa Clara Cnty. Corr. Peace Officers Ass'n, Inc. v. Abbate*, 2010 WL 302782, *4 (Cal. Ct. App. Jan. 27, 2010) (correctional peace officers union collective bargaining agreement included release time—"time taken by a union official away from his duties as a correctional officer to prepare grievances or address other union matters").

Second, union members are encouraged to volunteer in political campaigns or for political parties that promote the union's causes. Former union official and founder of the Labor Party Tony Mazzocchi explained, "Every election year, [w]e knock on doors, we staff the phone banks, we sponsor get-out-the-vote drives." Tony Mazzocchi, Building a Party of

Our Own, in Gregory Mantsios, ed., *A New Labor Movement for the New Century* 283 (1998).[10] Unions sometimes also pay "volunteers" to work full-time in political campaigns. Chavez & Gray, *supra*, *Betrayal* at 41. Unions are particularly eager to provide volunteer support when the candidates are themselves union members. "[T]hey will often benefit from union support provided through endorsements, financial contributions, communications campaigns, field volunteers, and voter mobilization." Aaron J. Sojourner, *Do Unions Promote Members' Electoral Office Holding? Evidence from Correlates of States Legislatures' Occupational Shares*, 66 Indus. & Lab. Rel. Rev. 467, 470 (2013). The union may also provide "candidate boot camp" training for member-candidates. *Id.*

3. Information Communication

Informational support consists of union newspapers and magazines that endorse favored candidates and political parties, as well as leaflets distributed at unionized workplaces urging workers to vote as directed by the union. *See United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 121 (1948) (union periodicals may advise members of the "danger or advantage to their interests" from pending legislation or candidates for elective office); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1976) (employees may distribute union leaflets discussing both collective bargaining and general political matters on employer's premises, such as opposing "right to work" legislation or criticizing a Presidential veto of a minimum wage increase); *Local*

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[10] https://books.google.com/books?id=yMjORniv4yoC&pg=PR5&source=gbs_selected_pages&cad=2#v=onepage&q&f=false.

174, Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., (UAW) v. NLRB, 645 F.2d 1151, 1152 (D.C. Cir. 1981) (union leaflets distributed on work premises to induce workers to vote for specific candidates for government, United States Senator, and state supreme court).

These publications promote the union's recommendations as to which candidates and issues the membership should favor, and they disregard or denigrate those of the political opposition. Consider, for example, just a single issue of the California Teachers Association's primary publication—*California Educator*—published with union dues and agency shop fees, and sent to all members in the state. The October, 2014, issue, distributed just prior to that year's elections, highlighted two of union's key political goals on the front cover: "No on 46," "Yes on 47," and "Re-elect Tom Torlakson Superintendent of Public Instruction."[11] Inside, the union offered its "voter guide" and "list of recommendations." The ballot initiatives were singled out for special advocacy, *id.* at 33, although *neither related to education*. Proposition 46 would have increased the cap on non-economic damages in medical malpractice cases and contained provisions related to drug testing of health care professionals.[12] Proposition 47 reclassified certain

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[11] http://educator.cta.org/i/396235-october-2014.

[12] http://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuits_Cap_and_Drug_Testing_of_Doctors_%282014%29.

property and drug crimes from felonies to a misdemeanors.[13]

The union advised the teachers how to vote on every statewide office, on most state legislative seats, and on selected U.S. House races. *Id.* at 32-33. The Superintendent race pitted Torlakson, who long enjoyed the backing of the teachers' unions, against Marshall Tuck, a charter school executive.[14] The election was particularly important because the Superintendent heads the state's Department of Education, and oversees the education of more than 7 million children and young adults (in community colleges) in more than 9,000 schools. Cal. Dep't. of Educ., *Role & Responsibilities*.[15] The Department, directed by the Superintendent and State Board of Education, funds an array of programs and establishes the state's priorities for education funding. Cal. Educ. Code § 33111. The Superintendent also bears responsibility for developing certain curriculum, *see, e.g.*, Cal. Educ. Code § 51206, which, in California, frequently contains political and ideological content.[16]

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[13] http://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_%282014%29.

[14] *See* Craig Clough, *Top 5 issues in Tuck vs. Torlakson state superintendent race*, LA School Report (Oct. 23, 2014), http://laschoolreport.com/top-5-issues-in-tuck-vs-torlakson-race/.

[15] http://www.cde.ca.gov/eo/mn/rr/.

[16] *See, e.g.*, Cal. Educ. Code § 51204.5 ("Instruction in social sciences shall include the early history of California and a study of the role and contributions of both men and women, Native Americans, African Americans, Mexican Americans, Asian Americans, Pacific Islanders, European Americans, lesbian, gay, (continued...)

4. Using the Unions' Structure to Benefit Candidates and Issues

The California Teachers Association is an affiliate of the National Education Association and, in turn, supports local chapters. The unions' structure is both wide and deep, and places unions in a dominating position to promote candidates and issues at all levels of government. The leverage of public sector unions is especially great in municipalities and school districts because these jurisdictions are the closest to the public employer-politicians. Troy, *supra*, *Municipal Collective Bargaining*, 5 U. Pa. J. Lab. & Emp. L. at 456.

For example, in *San Leandro Teachers Ass'n*, 46 Cal. 4th at 829, just prior to a school board election, the teachers' unions distributed two newsletters in teacher and staff mailboxes. One newsletter featured two union-endorsed candidates, and the other specifically urged members to "volunteer to phone or walk in support of our endorsed School Board Candidates." *Id.* And in New Mexico, after a state law permitted school districts to allow collective bargaining agreements to expire without renewal, the Las Cruces school district initially chose to allow its agreements to expire. However, the teachers union successfully backed school board candidates in subsequent elections who then voted to restore collective bargaining in the district. Benjamin A. Lindy, *The Impact of Teacher*

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[16] (...continued)
bisexual, and transgender Americans, persons with disabilities, and members of other ethnic and cultural groups, to the economic, political, and social development of California and the United States of America, with particular emphasis on portraying the role of these groups in contemporary society").

Collective Bargaining Laws on Student Achievement 120 Yale L. J. 1130, 1171 n.146 (2011).

The local elections are only part of the picture, because the California Teachers Association—and other state and local teachers unions—also act as part of a nationally coordinated whole as, for instance, when its members demonstrated in protests in solidarity with the unions opposed to Wisconsin Governor Scott Walker's reforms, and to support the Occupy Movement protests. *See, e.g.*, CTA Press Release: *CTA Stands in Support of Educators and Public Workers in Wisconsin Fighting to Retain Right to Bargain* (Mar. 10, 2011);[17] CTA Press Release: *California Educators Stand with Occupy Protestors* (Nov. 18, 2011).[18] As a state affiliate of the National Education Association, to which it remits some portion of member dues, the California Teachers Association also supports the national organization's political positions. *See* National Education Association, Legislative Action Center, *Issues & Legislation* (taking positions on the Voting Rights Advancement Act, Social Security Fairness Act, federal minimum wage, Health Benefits Tax Repeal bill, and more).[19]

The vertical integration of the national, state, and local unions amplifies the political effectiveness of each of them beyond what they could accomplish standing alone.

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[17] http://www.cta.org/About-CTA/News-Room/Press-Releases/2011/03/20110310_1.aspx.

[18] http://www.cta.org/About-CTA/News-Room/Press-Releases/2011/11/20111118_1.aspx.

[19] http://capwiz.com/nea/issues/.

B. The California Correctional Peace Officers Association (CCPOA) Also Exemplifies the Political Reach and Power of Public Sector Unions

The California Teachers Association is only one of several powerful public employee unions in the state. The CCPOA started representing prison guards in 1980 and has since established strong political bona fides. Its modest membership of 1,600 when it was founded in 1980 grew to 31,000 by 2010, thanks in large part to the union's advocacy for tougher crime laws intended to imprison more offenders coupled with advocacy for more prison construction. Steven Malanga, *The Beholden State*, City J. (Spring 2010).[20]

The union's approach successfully targeted both supply (increasing the number of prisons requiring staff) and demand (increasing the number of criminal offenders sentenced to prison). Before 1980, California had 12 prisons for adults; by 2000, the state had 34. Daniel DiSalvo, *The Trouble with Public Sector Unions*, National Affairs (Fall, 2010) at 12.[21] The CCPOA uses its political influence to advance a highly successful pro-incarceration agenda, where "incarceration" includes "the criminalization of a greater range of behavior, more active enforcement, greater reliance on imprisonment, longer sentences, and less parole—anything that ultimately increases person-years in prison." Alexander Volokh, *Privatization and the Law and Economics of Political*

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[20] http://city-journal.org/2010/20_2_california-unions.html.

[21] http://www.nationalaffairs.com/doclib/20100918_DiSalvo_pdf%5B1%5D.pdf.

Advocacy, 60 Stanford L. Rev. 1197, 1217 (2008). To this end, the CCPOA

> gave over $100,000 to California's Three Strikes initiative. . . in 1994, making it the second-largest contributor. It gave at least $75,000 to the opponents of . . the 2000 initiative that replaced incarceration with substance abuse treatment for certain nonviolent offenders. From 1998 to 2000 it gave over $120,000 to crime victims' groups, who present a more sympathetic face to the public in their pro-incarceration advocacy. It spent over $1 million to help defeat . . . the 2004 initiative that would have limited the crimes that triggered a life sentence under the Three Strikes law.

Id. at 1222 (citations omitted). Because the CCPOA's goals are to benefit prison guards, not prisoners or the general public, the union opposes alternative approaches to crime focused on rehabilitation and training programs. Lee E. Ohanian, *America's Public Sector Union Dilemma*, American Enterprise Inst. (Nov. 26, 2011).[22] The CCPOA also opposes any prison privatization, which like all competition, would tend to reduce operating costs. *Id.*

On wage and pension issues, the CCPOA was equally effective: In 2006, the average union member made $70,000 a year, and more than $100,000 with overtime. Corrections officers can also retire with 90 percent of their salaries as early as age 50. *Id.* As a result, California's prison system costs taxpayers about

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[22] http://www.aei.org/publication/americas-public-sector-union-dilemma/.

$47,000 per inmate per year. *See* Legislative Analyst's Office, *California's Annual Costs to Incarcerate an Inmate in Prison 2008-09.*[23] By comparison, the annual cost of incarcerating a federal inmate in 2013 was just under $29,000. U.S. Dept. of Justice Bureau of Prisons, *Annual Determination of Average Cost of Incarceration* (Mar. 18, 2013).[24]

The CCPOA's advocacy, whether in regard to wages and benefits for prison guards, to the construction of new prisons and sale of state bonds to pay for them, to proposed ways to respond to recidivism, implicates matters of public concern. Whether this advocacy occurs during the course of negotiating a collective bargaining agreement or while generating a letter-writing campaign to state legislators makes no difference. It is all equally political and, as such, should be funded only by those people who share the union's political goals.

CONCLUSION

Public employee unions have become what James Madison called "the praetoran band of the Government, at once its tool and its tyrant; bribed by its largesses, and overawing it, by clamours and combinations." Madison, James, *Letter to Thomas Jefferson* (Aug. 8, 1791), in 2 James Morton Smith, ed., *The Republic of Letters: The Correspondence between Thomas Jefferson and James Madison 1776-1826,* 706

[23] http://www.lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost.

[24] https://www.federalregister.gov/articles/2013/03/18/2013-06139/annual-determination-of-average-cost-of-incarceration.

(1995). They differ from private-sector unions in that they use money obtained ultimately from taxpayers to fund self-interested political machines that typically result in expanding government still further, at the taxpayer's expense. At no point in the process does the taxpayer have a say.

Yet public employees, like Rebecca Friedrichs and her colleagues are taxpayers, too, and they do not agree with the political agendas these unions pursue. Nevertheless, thanks to this Court's decision in *Abood*, their paychecks are regularly docked to subsidize these political efforts. There would be nothing objectionable with unions or any other group lobbying the government, supporting candidates, or opposing initiatives, as described in this brief—if they did it with their own money. To use the law to force Friedrichs and others to support the union's priorities against their own consciences violates the First Amendment and the basic principle that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " *Hudson*, 475 U.S. at 305 n.15 (quoting Thomas Jefferson).

It is far past time for public-employee unions to join the great American tradition of *voluntary* associations, where participants *willingly* contribute their time and treasure to common goals. This Court should uphold workers' First Amendment rights and overrule *Abood*.

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